No. 79-462

In the Supreme Court of the United States

OCTOBER TERM, 1979

TIMOTHY RICHARD HOUDE AND BARRY ALAN LABRECQUE, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
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Washington, D.C. 20530

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Petitioners contend that the district court erred in denying their motion for a continuance after the government, contrary to a pretrial agreement, did not provide statements of two witnesses until the first day of trial.

1. Following a jury trial in the United States District Court for the Western District of Texas, petitioners were convicted of distribution of cocaine, in violation of 21 U.S.C. 841(a)(1) and 18 U.S.C. 2, and conspiracy to possess cocaine with intent to distribute it, in violation of 21 U.S.C. 846. Petitioner LaBrecque was sentenced to consecutive terms of nine years' imprisonment and nine years' special parole on each count; petitioner Houde was sentenced to consecutive terms of seven years' imprison-

ment and seven years' special parole on each count. The court of appeals affirmed (Pet. App. 1a-19a).

a. The evidence, the sufficiency of which petitioners do not dispute, is set forth in detail in the opinion of the court of appeals (Pet. App. 2a-8a). In brief, it showed that in March 1978 petitioners obtained a large quantity of cocaine, which co-conspirator Connell agreed to sell. Connell's girlfriend, Liggin, flew from El Paso to Seattle to sell the cocaine, but the transaction fell through. Upon Liggin's return to El Paso, it was discovered that some of the cocaine was missing. The cocaine had been delivered to petitioners without prepayment, and they and Connell decided to share responsibility for raising the money still owed to their source of supply. Subsequently, Connell was contacted about a cocaine purchase by Gary Graham, an undercover detective with the Denver Police Department. At Connell's request, petitioner LaBrecque approached the cocaine supplier, who agreed to advance another quantity of cocaine to enable the conspirators to repay the balance due on the original transaction. After lengthy negotiations, Connell delivered a half-pound of cocaine to Detective Graham on April 26, 1978, at which time petitioners were arrested.

b. On May 17, 1978, petitioners and the government agreed that the parties would exchange all witness statements five days prior to trial. On May 31, in accordance with the agreement, petitioners were given access to the government's case reports and results of the laboratory tests of the cocaine. That same date, petitioners requested a list of government witnesses. On June 1, the government replied that there were no witnesses whose names did not appear in the case reports already provided, but that names of any additional witnesses uncovered in the ongoing investigation would be

disclosed as soon as possible (Pet. App. 9a-10a). On June 2, the government supplied petitioners with a list of witnesses that included the names of Liggin and co-conspirator Connell. However, although Connell and Liggin gave statements on June 1 and June 2, respectively, copies of these statements were not provided to petitioners until June 5, the first day of trial (*id.* at 10a).

Petitioners moved for sanctions and for a continuance, claiming that the government had breached the pretrial agreement by failing to furnish the names of witnesses Connell and Liggin when they became known to the government and by failing to provide copies of their statements until the first day of trial. The district court denied both motions (Pet. App. 10a).

2. Petitioners contend (Pet. 15-23) that because the government violated the pretrial agreement, the district court erred in denying their motions for a continuance or for sanctions.

We acknowledge that when the government enters into a discovery agreement, it is under a duty to comply with it. *United States* v. *Rodarte*, 596 F. 2d 141, 145 (5th Cir. 1979); *United States* v. *Phillips*, 585 F. 2d 745, 747 (5th Cir. 1978); *United States* v. *Scanland*, 495 F. 2d 1104, 1106 (5th Cir. 1974). However, breach of such an agreement is not grounds for relief in the absence of a showing of prejudice. *United States* v. *Phillips*, *supra*.[1]

[1] *United States* v. *Millet*, 559 F. 2d 253 (5th Cir. 1977), upon which petitioners rely (Pet. 17), is not to the contrary. There the court observed in dictum that noncompliance with a discovery agreement would be "a serious breach of the Government's duty, as well as a *possible* violation of a defendant's constitutional due process rights" (559 F. 2d at 257; emphasis added). As the court below correctly noted (Pet. App. 11a), in the absence of prejudice there is no due process violation.

The breach here was only that the government provided the names of Connell and Liggin three days before trial, rather than five days before, and that it failed to provide the statement of those witnesses until the day of trial, rather than five days before. As the court of appeals noted (Pet. App. 11a), petitioners have been unable to specify any prejudice that they incurred as a result of this rather minor transgression.[2]

The only prejudice that petitioners alleged before the trial court was that " 'the Government received the suprise and other advantages of its lack of faith' " (Pet. App. 10a). However, petitioners knew that Connell was going to testify before the prosecution gave them his name, and petitioners knew, from having read the case report, of Connell's connection to the case (*ibid.*). The court of appeals thus correctly concluded that the testimony came as "no surprise" to petitioners (*ibid.*). Finally, because the government did provide the witnesses' statements at the beginning of trial, it more than met its obligation under the Jencks Act, 18 U.S.C. 3500(b), to do so only after the witnesses testified.[3]

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[2]Furthermore, Connell and Liggin did not even make the statements at issue until four and three days before trial, respectively.

[3]This case is thus unlike *United States* v. *Roybal*, 566 F. 2d 1109 (9th Cir. 1977), upon which petitioners rely (Pet. 22). In *Roybal*, the government, in violation of a discovery order, failed to disclose information it intended to bring out through an informant; "[i]nstead, it waited until the informant was on the witness stand and then adduced the information without any warning to [defendant]" (566 F. 2d at 1110). Petitioners' reliance (Pet. 22) on *United States* v. *Nobles*, 422 U.S. 225 (1975), is likewise misplaced. In *Nobles*, defense counsel sought to impeach the credibility of key prosecution witnesses by testimony of a defense investigator regarding statements the investigator had previously obtained from the witnesses. When defense counsel advised that he did not intend to comply with the court's order to produce the report at the completion of the

In these circumstances, it cannot be said that the denial of the continuance was "so arbitrary as to violate due process." *Ungar* v. *Sarafite*, 376 U.S. 575, 589 (1964). The court of appeals therefore correctly held "that there was no abuse of discretion by the trial court in denying the motion for sanctions and the motion for a continuance" (Pet. App. 12a).[4]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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investigator's direct testimony, the court refused to allow him to testify, a sanction which this Court upheld. Thus, contrary to petitioners' assertion, that case did not involve imposing sanctions against a defendant for failure "to timely provide the Government with a report" (Pet. 22), but rather for a refusal to provide it at all. And, as this Court noted, "[t]he District Court did not bar the investigator's testimony. It merely prevented [the defendant] from presenting to the jury a partial view of the credibility issue by adducing the investigator's testimony and thereafter refusing to disclose the contemporaneous report that might offer further critical insights" (422 U.S. at 241; citation omitted).

[4]Petitioners also argue (Pet. 23-25) that the district court wrongly denied them an evidentiary hearing on the motion for a continuance "by the curious plot of stipulating to the breach and the prejudice" (Pet. 23) and that the court of appeals was therefore bound by that stipulation. It is evident, however, that in rejecting petitioners' claims, the court of appeals justifiably relied on counsel's concessions at oral argument, where counsel "were unable to point out any prejudice to their clients, and * * * [did] not allege[] any" (Pet. App. 11a). Even now, petitioners do not specify how the asserted breach prejudiced their defense, nor what evidence they would have presented to establish such prejudice had the court held a hearing. Accordingly, the district court's failure to hold a hearing does not warrant reversal.